

APPEAL NO. 041236
FILED JULY 12, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 23, 2004. The hearing officer determined that as a result of the _____, compensable injury, the appellant (claimant) did not have disability from June 26, 2003, through the date of the hearing. The claimant appeals this determination and asserts that the hearing officer erred in admitting certain exhibits, more fully described below. The respondent (carrier) urges affirmance of the hearing officer's decision and argues that the admission of the complained-of exhibits does not constitute reversible error.

DECISION

Affirmed.

In order to obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; see *also Hernandez v. Hernandez*, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). It has also been held that reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. *Atlantic Mut. Ins. Co. v. Middleman*, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The evidence reflects that the carrier offered Carrier Exhibits A through H into evidence. The claimant objected to all of these exhibits, with the exception of Exhibit E¹, on the basis that they were not timely exchanged and that they were not relevant to the proceedings. The hearing officer admitted all of the carrier's exhibits. It is clear from the hearing officer's decision that he considered Carrier's Exhibits A and B in making his decision. Carrier's Exhibit A is a prior hearing decision pertaining to the claimant and Exhibit B is the Appeal Panel decision addressing the claimant's appeal of that [hearing] decision and order. Because the claimant's injury became compensable as a result of carrier waiver and because there was no stipulation as to the nature of the compensable injury, the hearing officer considered these two exhibits. As it was necessary for the hearing officer to ascertain the nature of the compensable injury in order to decide disability, we perceive no error in the admission of Exhibits A and B. With regard to Exhibits C, D, and F through H, we would point out that there is no indication that the hearing officer relied on these exhibits in making his decision. As such, we cannot agree that the admission of these exhibits constitutes reversible error.

Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section

¹ Contrary to the claimant's statement on appeal that she did not object to the admission of Carrier's Exhibit F, the record reflects that the claimant had no objection to only Exhibit E.

401.011(16). Disability is a factual question for the hearing officer to resolve. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). It was the hearing officer's prerogative to believe all, part, or none of the testimony of any witness, including that of the claimant. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). Nothing in our review of the record indicates that the hearing officer's compensability determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**LEO F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.**

Chris Cowan
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge